

**NOT FOR PUBLICATION**

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

**FILED**

**OCT 21 2005**

CATHY A. CATTERSON, CLERK  
U.S. COURT OF APPEALS

UNITED STATES OF AMERICA,

Plaintiff - Appellant,

v.

CLARK MOSLEY,

Defendant - Appellee.

No. 04-10562

D.C. No. CR-03-00100-ECR

MEMORANDUM<sup>\*</sup>

Appeal from the United States District Court  
for the District of Nevada  
Edward C. Reed, District Judge, Presiding

Argued and Submitted October 19, 2005  
San Francisco, California

Before: REINHARDT and THOMAS, Circuit Judges, and RESTANI<sup>\*\*</sup>, Chief  
Judge, United States Court of International Trade.

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<sup>\*</sup> This disposition is not appropriate for publication and may not be  
cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

<sup>\*\*</sup> The Honorable Jane A. Restani, Judge, United States Court of  
International Trade, sitting by designation.

The United States appeals the sentence imposed by the district court. We affirm. Because the parties are familiar with the factual and procedural history of the case, we will not recount it here.

Assuming, without deciding, that the district court erred by holding that the existence of a prior conviction was a factual determination to be made by the jury, see United States v. Brown, 417 F.3d 1077, 1079 (9th Cir. 2005), we conclude that any error was harmless.

A district court's application of the sentencing guidelines "is subject to harmless error analysis, and no remand is required if the error did not affect the district court's selection of the sentence imposed." United States v. Mendoza, 121 F.3d 510, 513 (9th Cir. 1997). At sentencing, the government did not proffer judicially-noticeable documents from which the district court could have found that Mosley had been convicted of a crime of violence. Shepard v. United States, 125 S. Ct. 1254 (2005). Nor did it proffer any evidence regarding number of pictures, ages of subjects, or other matters that might have resulted in the imposition of an enhanced sentence. As a result, the district court's error did not affect the sentence it ultimately imposed.

**AFFIRMED.**